



Legal Issues in Preparing Post-Construction Stormwater Management Ordinances

Prepare the Way



- A “community can avoid legal challenges by citing the legal authority under which a utility is established from the outset, providing evidence of the need for the utility and the public process used to create it, and ensuring that the stormwater utility ordinance is consistent with other local, state and federal regulations.”
- *Massachusetts “How-To” Guide May Help Communities Implement Successful Stormwater Management Systems*, 10 NO. 8 Stormwater Permit Manual Newsl. 1 (March 2001).

Community Input

- All stakeholders involved
- Education of all involved from all involved



Where Am I?

- Authority depends on Class of city/county
 - Charter, 3rd class or 4th class city?
 - County with a charter form of government or not?





Dillon's Rule



- Missouri - Dillon's Rule
 - Local Government Units Enjoy Only Those Powers:
 - Expressly granted
 - Necessarily implied (essential)
 - If Questionable, Power Is Denied

Main Areas of Focus



1. Existing Ordinances
2. Authority
3. Fees
4. Taking of Property Without Just Compensation
5. Equal Protection
6. Selective or Retroactive Enforcement of Stormwater Ordinances

Existing Ordinances

- Street standards
- Parking requirements
- Tall grass / weeds
- Impervious requirements
- Grading
- Buffer/Floodplain



Authority



- Certain counties – Sec. 64.907 RSMo. – storm water control utility and tax
- Cities, towns, and villages -- No statute specifically permitting adoption of post-construction runoff management ordinance
- Missouri zoning enabling statute, as with all development regulations, would seem to provide authority for stormwater regulations during and after development. Chapter 89 Revised Statutes of Missouri authorizing regulation for “the coordinated development of the city, town or village.” *See, e.g.*, §89.410
- Other authority such as the general police power (*i.e.*, protection of welfare, safety, health and even morals of public), power to construct and maintain sewerage system (Sec. 250.010 - operate a sewerage system -- includes the construction of such **storm water sewers**), and nuisance authority appear apply as well

Authority



- Other states -- courts have found authority for these ordinances under the **police power**
- *Taylor v. Harmony Township Bd. of Comm'rs*, 851 A.2d 1020, 1024-27 (Pa. Commw. Ct. 2004)
 - where landowners argued that the ordinance upon which the denial of permit was based was not authorized by law, court held that because ordinance purpose was to minimize floods, landslides, and dangerous stormwater runoff, ordinance clearly fell within general police powers of city and bore **substantial relationship** to public protection

Authority

- Regulations must squarely fit into the local government's existing authority



Fees



- If ordinance provides for a funding mechanism for stormwater projects or programs –
- Hancock Amendment (Mo. Const., Art X, §§ 16-24) mandates that any charge made by municipality that constitutes a “tax, license or fee” can only be imposed after **voter approval**



Fees



Generally, under Missouri case law, a charge is a **user fee** (*i.e.*, **not a tax** requiring voter approval) if it is:

- (1) a fee charged for actual service or good;
- (2) charged only to persons receiving good or service;
- (3) charged after or at time service or good is provided;
- (4) based on actual cost of providing service or good to specific person charged the fee; and,
- (5) is not a service, permission or activity historically and exclusively provided by the government

Fees

- Other challenges take the form of claims by fee payers that the fee imposed on landowners is **not rationally related** to the services received
- Other state courts have approved multiple calculation methods as reasonable



Takings



- Stormwater regulation cannot “go too far” and effectively “take” all use of the owner’s property without just compensation
- A/k/a “Takings” claim
- Must draft ordinance to avoid regulations that effectively deny an owner all economically viable use of their property



Equal Protection



- Avoid irrational distinctions between property owners in implementation of regulations or assessment of any fee
- “Fairness”
- Problems arise when ordinance distinguishes between different types or classifications of properties
- Must be a rational relationship between the classification and a legitimate governmental interest

Equal Protection



- Classification that applies uniformly to similar properties does not violate equal protection clause
- Plaintiff's equal protection challenge that ordinance illegally distinguished between residential and non-residential properties by placing cap on charge for non-residential properties was rejected because, since classifications applied uniformly to similarly-sized lots, cap is rationally related to a governmental interest. *Brockmann Enterprises, LLC v. City of New Haven*, 868 N.E.2d 1130, 1134-35 (Ct. App. Ind. 2007)

Equal Protection



- Requiring one developer or landowner to pay entire bill for public improvement may not be rational because one property owner will not be only owner to benefit from such improvement
- *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269, 1275 (8th Cir. 1994) -- court overruled a grant of motion to dismiss, because “[a]lthough the County's objective to prevent flooding may be rational, it may not be rational to single out the [plaintiff] to provide the entire drainage system.”



Selective/Retroactive Enforcement

- Enforce the ordinance . . .
 - even-handedly
 - in all circumstances
 - with limited exceptions
- Municipality will have to decide what events will trigger ordinance and what developments will be considered too far along to be brought within ordinances' scope





Selective/Retroactive Enforcement

- Court dismissed selective enforcement challenge because although many developers and businesses had not had to comply with Stormwater Ordinance Management Control to receive permit, there is no right to have law go unenforced, “even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished”
- Could not prove alleged selective treatment was used “as a means of achieving **invidious discrimination** because of membership in a protected group or in **retaliation** for the exercise of a constitutionally protected right.”
- *Heaton v. City of Princeton, et al.*, 47 F.Supp.2d 841, 843 (W.D. Ky. 1997)



Selective/Retroactive Enforcement

- Stormwater Management Ordinance improperly **retroactively** applied to plaintiff
 - received preliminary approval
 - installed several stormwater management ponds in accordance with plan's specifications
 - township rejected Plaintiff's offer to dedicate ponds solely because he would not agree to provide funds pursuant to newly enacted stormwater ordinance
- *Myers v. Penn Township*, 812 A.2d 766, 767 (Pa. Commw. 2002)



Incentives

Development Incentives:

- Special zoning exceptions or concessions
- Expedited permitting (*i.e.*, expedited permit review for new development projects that include stormwater BMPs to encourage use of innovative techniques reducing burden on the MS4 and subsequently delaying the need for pipe sizing upgrades)



Incentives

Discounted Fees:

- A discount may be offered if a project reduces impervious area by including stormwater BMPs and managing stormwater runoff on-site – especially useful if impervious surface fee

Consultations:

- Providing free consultations to private property owners can promote stormwater BMPs --help to clear up any misunderstanding or lack of information regarding applications, cost, maintenance, and benefits of stormwater BMPs



Incentives

Awards Programs:

- Offer grant awards or recognition of efforts to reduce impacts; encourages participation as well as forming partnerships by having public and private sector strive towards common goal of improving water quality and reducing stormwater runoff

